

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

NO 4156 OF 2006

IN THE MATTER of an application by MILBEX PTY LTD and ZINA DEUEL
for modification of a restrictive covenant (**Application**) pursuant to section 84 of
the *Property Law Act 1958* (**Act**)

BETWEEN:

MILBEX PTY LTD AND ZINA DEUEL

Plaintiffs

OUTLINE OF ARGUMENT ON BEHALF OF PLAINTIFFS

THE SUBJECT LAND

1. The Application concerns the property known as 210 Tennyson Street, Elwood, more particularly described as the land contained in:
 - a) Certificate of Title Volume 10261 Folio 414; or
 - b) Lot 1 on Title Plan 079727S¹ (**Land**).²
2. The Certificate of Title for the Subject Land is the Exhibit A to the Affidavit of Andrew Phillip Downie dated 25 January 2006 (**Affidavit of Titles**).³

THE APPLICATION TO MODIFY THE COVENANT

3. The modification sought in the Application is set out in the Originating Motion dated 13 January 2006, namely:

An order pursuant to Section 84 of the Property Law Act 1958 that the Restrictive Covenant contained in instrument of transfer 0939468 in the register book at the Office of Titles and noted on Certificate of Title 10261 Folio 414 be modified to allow the

¹ NB Not Lot 1 on Plan of Subdivision 0797275 PS, as suggested in the Affidavit of Titles on page 1.

² The Subject Land was formerly known as part of Lot 25 on Plan of Subdivision 007283.

³ Measuring 13.11m * 43.3m = 567sqm.

development of a three storey building containing seven dwellings generally in accordance with Planning Permit No. 1149/2004.⁴

4. Planning Permit No. 1149/2004 was issued by the City of Port Phillip on 15 April 2005 (**Permit**) for:

*The development of a three storey building containing seven dwellings with a basement car park generally in accordance with the endorsed plans and subject to ... conditions (**Proposed Development**).*

5. The Permit is Exhibit GG2 to the affidavit of Giovanni Gattini, dated 28 July 2006.

THE RESTRICTIVE COVENANT

6. The terms of the relevant restrictive covenant are contained in instrument of transfer 0939468 (**Covenant**), set out in Exhibit B to the Affidavit of Titles.

7. The Covenant provides, *inter alia*:

I HENRY FIGSBY YOUNG of "Normanhurst" Brighton Road St. Kilda Gentleman being registered as the proprietor of an estate in fee simple in the land hereinafter described subject to the encumbrances notified hereunder in consideration of the sum of One thousand five hundred and six pounds paid to me by ALFRED JOHN GRIFFITH of "Carbethorn" Brandon Street Brighton Builder DO HEREBY TRANSFER to the said Alfred John Griffith all my estate and interest in all that piece of land being lots 21, 22, 23, 24 and 25 on Plan of Subdivision No. 7283 lodged in the Office of Titles and being part of the land more particularly described in Certificate of Title Volume 4100 Folio 819848 Together with a right of drainage for surface water and for sewerage purposes over that part of Lot 26 coloured blue on the said Plan of Subdivision reserving onto me and my transferees registered proprietor or proprietors for the time being of Lots 1, ... 3, 10, 11, 17 18, 19 and 20 on the said Plan of Subdivision a right of drainage for surface water and for sewerage purposes over the parts of the lots hereby transferred coloured blue on the said plan of subdivision and the said Alfred John Griffith DOETH HEREBY for himself his heirs executors administrators and transferees COVENANT with the said Henry Figsby Young his heirs executors administrators and transferees the registered proprietor or proprietors for the time being of the balance of the land in Certificate of Title Volume 4100 Folio 819848 other than the land hereby transferred as follows:-

⁴ Emphasis added.

- a) *That not more than six buildings shall now or at any time hereafter be erected on the land hereby transferred and that each of such buildings shall be a detached private dwelling house with the usual and necessary outbuildings thereto and each of which said dwelling houses shall front Tennyson Street shewn on the said plan of subdivision and that none of such dwelling houses shall be roofed with iron or any inflammable material nor shall any of the said dwelling house be used as a shop or for the purpose of any trade manufacture or business or otherwise than as and for a private residence and further that each of such dwelling houses exclusive of outbuildings and fencing shall not be of less value than seven hundred pounds such value to consist of the actual cost of labour and materials alone.*
- b) *That no hoarding or other erection for advertising purposes shall at any time be erected on the said land hereby transferred nor shall the said land be used for storage purposes.*
- c) *That no earth sand clay or gravel shall be dug or removed from the said land hereby transferred except for the purpose of excavating for the foundation of any building to be erected thereon and the said Alfred John Griffith hereby requests that the above covenants may appear as encumbrances on the Certificate of Title to issue in respect of the land hereby transferred.*

DATED this twenty third April One thousand nine hundred and twenty.

- 8. For present purposes, the effect of the Covenant is that:
 - a) only six buildings in total can be erected on the land in Lots 21 to 25 of the land previously described on PS7283; and
 - b) each of those buildings must be a detached private dwelling house fronting Tennyson Street.
- 9. By Supreme Court Order dated 16 June 1970 made by Master Jacobs (**1970 Decision**), the Covenant was varied by adding at the end of the Covenant the following:

PROVIDED that the erection on part of Lots 24 and 25 on the said Plan of Subdivision being the land now known as No. 208 Tennyson Street Elwood of a three storey block of eight flats shall not be deemed to have been or to be a contravention of this covenant.

LAND WITH THE BENEFIT OF THE COVENANT

10. The land with the benefit of the Covenant is set out in paragraphs 10 to 206 of the Affidavit of Titles.
11. A summary of this land is provided in paragraph 207 of the Affidavit of Titles and is visually presented in a diagram provided at Exhibit F to the Affidavit of Titles.

ADVERTISING

12. On 9 February 2006, the Court made orders concerning the service and advertising of prescribed Notices for beneficiaries of the Covenant.
13. On 26 May 2006, after being satisfied that the required advertising had properly been carried out, Master Evans referred this Application to the Practice Court for further directions.

THOSE OPPOSED TO THE APPLICATION

14. Although there are no defendants to this proceeding, this application was opposed by a number of people with the benefit of the Covenant. These objections are on the Court file.

EVIDENCE TO BE RELIED UPON BY THE PLAINTIFF

15. The Plaintiff relies on the evidence of two witnesses:
 - a) Giovanni Gattini, town planner; and
 - b) Charmaine Dunstan, traffic engineer.
16. The affidavits of these witnesses have been filed and served and copies are attached to this outline of argument.

RELEVANT LEGISLATION

17. Section 84 of the Act provides:
 - (1) *The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied –*

...

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration paid for the acquisition of the land was reduced.”.

- (2) *The Court shall have power on the application of any person interested—*
 - (a) *to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument; or*
 - (b) *to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.*
- (3) *The Court may before making any order under this section direct such inquiries (if any) to be made of any local authority or such notices (if any) whether by way of advertisement or otherwise to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified or dealt with as, having regard to any inquiries, notices or other proceedings previously made given or taken the Court thinks fit.*

LEGISLATIVE PROVISION RELIED UPON

18. In the present proceedings the Plaintiffs rely on section 84(1)(c) contending that the proposed modification will not substantially injure the persons entitled to the benefit of the restriction.

THE APPLICATION OF SECTION 84(1)(c)

19. The recent decision of this Honourable Court, *Stanhill Pty Ltd ats Jackson & Others*⁵ (**Stanhill**), considered the history and scope of section 84 of the Act, including section 84(1)(c) in some detail. *Stanhill* is attached to this outline of argument.
20. *Stanhill* affirmed that the determination of what amounts to “substantial injury” is a question of fact to be determined on the facts of each case:

*In Re Ulman*⁶ *McGarvie J* observed that, when it comes to paragraph (c):

*“The proper approach is to compare what the covenant before modification permits to be done on the land which it binds with what it would permit to be done after modification.”*⁷

In that case McGarvie J concluded that the modification sought would not substantially injure any of the persons entitled to the benefit of the restriction. It is apparent from the decision that his Honour treated the word “substantially” as being the equivalent of “significantly”. He also observed, as the Full Court had in *Re Stani*, that whether the proposed modification would substantially injure the persons entitled to the benefit of the restrictions in the covenant is essentially a question of fact.⁸

*In Re Cook*⁹ *Gillard J* expressed the view that, in order to succeed under paragraph (c), the applicant cannot establish his case by merely proving that there will be no appreciable injury or depreciation in the value of the property to which the covenant is annexed.¹⁰ He said the emphasis in paragraph (c) is on the injury suffered by the persons entitled to the benefit, observing:

“Such injury can only be properly assessed by a comparison between the benefits intended to be conferred and actually conferred by the covenant initially on the persons entitled thereto and the resultant benefits if any remaining to such persons after the covenant has been modified. If from the evidence it appears that the difference between the two will not be substantial, then the applicant will have established a case for the exercise of the court’s discretion under paragraph (c). In order to make this comparison it is

⁵ [2005] VSC 169 (19 May 2005)

⁶ (1985) V Conv R 54-178.

⁷ (1985) V Conv R 54-178 at 63,420.

⁸ (1985) V Conv R 54-178 at 63,420.

⁹ [1964] VR 808.

¹⁰ [1964] VR 808, at 810.

proposed to consider what benefits the covenant over the subject land may have conferred upon the persons entitled thereto, and then to assess whether the modification of such covenant would or would not substantially diminish the benefits so discovered.”¹¹

THE COVENANT IN THIS CASE WILL NOT RESULT IN SUBSTANTIAL INJURY

The only evidence before the Court suggests no substantial injury

21. The only evidence before the Court is to the effect that the proposed modification will not substantially injure persons entitled to the benefit of the Covenant:
- a) the Proposed Development is sufficiently setback from the land with the benefit of the Covenant so that it will not present unreasonable visual bulk, particularly having regard to the landscaping proposed;
 - b) the Proposed Development will only give rise to negligible additional overshadowing, which would barely be perceptible;
 - c) the Proposed Development will not result in any overlooking, having regard to the screening proposed;
 - d) the Proposed Development is a building that is appropriately screened so as to not create any unreasonable levels of overlooking; and
 - e) insofar as traffic and parking impacts are concerned:
 - 1) there is sufficient parking available on-street along the site’s frontage and within the nearby area to comfortably accommodate any visitor parking associated with the Proposed Development; and
 - 2) the level of additional traffic generated as a result of the Proposed Development will be low, residential in nature and will not have a detrimental impact on the safety and operation of Tennyson Street or the surrounding road network; and
 - f) having regard to the absence of impact, there is no basis for concern about a loss of value.

¹¹ [1964] VR 808, at 810-811.

The Court has the benefit of plans to assess the proposal

22. The absence of development plans in *Stanhill* appears to have been a significant factor in the Court not approving a development at a greater density:

69 *The present application is brought in the absence of specific development plans. This does not mean that if the modification sought is granted the plaintiff would have carte blanche; it would still be subject to the requirements of the Darebin Planning Scheme. However, unlike the situation facing Osborn J in Longo Investments Pty Ltd, the lack of specific plans makes it more difficult for the plaintiff to discharge the onus of showing that a modification of a restriction will not substantially injure persons entitled to the benefit of the restriction.*

23. In the present case, the Court has the benefit of being able to ascertain with considerable precision any injury that might be said to occur.

The Plaintiff's evidence is supported by reference to the independent officer's report

24. Prior to receiving approval, the Proposed Development was assessed by an independent planning officer at the City of Port Phillip, who concluded:¹²
25. After considering the concerns expressed by neighbouring landowners, the relevant officer concluded:

*"The development would provide a good level of amenity for future residents, have minimal amenity impacts on adjoining properties (subject to conditions) and is considered to be an appropriate design response given the context of the site."*¹³

...

The development would have no significant impact on the public realm.

...

*The proposed front setback would be consistent with the adjoining properties and narrow side setbacks would be provided. The setback from the rear boundary would be a minimum of 3.0m allowing adequate room for landscaping.*¹⁴

¹² For a copy of the relevant officer's report, see Exhibit GG14 to the affidavit of Giovanni Gattini, dated 28 July 2006.

¹³ At pages 177 and 178.

¹⁴ At page 179.

Overall it is considered that the proposed design has adequately responded to and limited the impacts upon the adjoining residential properties

A THREE STOREY DWELLING COULD BE BUILT WITHOUT BREACHING THE COVENANT

26. Subject to obtaining a further planning permission if there were any non-compliance with mandatory setback requirements, a three storey structure could be erected that was not in breach of the Covenant and its attractive position, a three storey house would hardly be over capitalizing the land.

CONCLUSION

27. Whilst the grant of a planning permit does not determine the issues under section 84(1)(c) of the Act, it is submitted that it is a relevant consideration in the assessment. Having regard to the affidavit evidence and the fact that none of those with the benefit of the Covenant wishes to appear to contest this Application it is further submitted that the Court should form the view that whilst the Proposed Development will result in change, and perhaps some minor impacts, it will not result in “substantial injury”.
28. Given that a substantial single dwelling could have similar impacts, it can be seen that the difference between what the modification sought would allow and what might otherwise be built would not be substantial. Hence the test in *Re Cook* is met.

Jeremy Gobbo QC
Owen Dixon Chambers West

Matthew Townsend
Owen Dixon Chambers East